Fair Political Practices Commission
MEMORANDUM

To: Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh and Remy

From: Lawrence T. Woodlock, Senior Commission Counsel
Scott Hallabrin, General Counsel

Subject: Supplementary Memorandum: The Scope of Regulation 18530.31

Date: November 1, 2007

Introduction

Following Sections 85301 and 85302, which set limits on contributions to candidates for elective state office, Government Code Section 85303 addresses contribution limits to other committees. Section 85303 sets up a distinction between contributions that are made or used for the purpose of making contributions to candidates for elective state office – and contributions made or used for all *other* purposes. Subdivisions (a) and (b) provide that a "state candidate contribution" to a committee may only be made within specified limits while, under subdivision (c), a contribution made or used for any *other* purpose is expressly not subject to limitation. The statute does not expressly specify how and where to draw the line that separates "state candidate contributions" from contributions that are not subject to limit. That omission has generated some controversy.

Representatives of committees subject to this statute urge that the Commission narrowly define the contributions that are limited. But, while the committees argue that the limits should apply only to a single form of contribution "transaction" – the narrowest possible reading that still gives some meaning to the statutory language – staff contends that *two* transactions fit the plain-English meaning of "contributions made/used for the purpose of making contributions to candidates for state elective office." Legislative history supports staff's interpretation, which provides a rule that would impede the flow of unlimited "soft money" into candidate campaign accounts. The competing interpretation permits a use of soft money in candidate fundraising activities that effectively circumvents the contribution limits of Sections 85301 and 85302, which were the masthead provisions of Proposition 34.

Discussion

A. Interpretation of the Statutory Language

To effectively implement Section 85303 it is first necessary to define the contributions described in subdivisions (a) and (b) as contributions "made or used to make contributions to candidates for elective state office." The committees propose that any inquiry into the proper interpretation of the statute must begin from subdivision (c), which provides as follows:

> "(c) Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office."

The problem with beginning from subdivision (c) is that it refers to a class of contributions defined by their *exclusion* from another class. Just as one cannot define the class of colors that are not red until "red" itself is defined, any understanding of subdivision (c) must follow an understanding of what is meant by "contributions made or used to make contributions to candidates for elective state office." A focus on this language, which describes contributions that are subject to limits under subdivisions (a) and (b), does not imply that one subdivision is more important than any another. It simply concedes that we must describe those contributions that are limited before it is possible to understand the converse rule – that all *other* contributions are exempted from limits by operation of subdivision (c).

The initial task is therefore to define the kind of contribution that Section 85303 limits. Staff has concluded that the language of the statute invites consideration of three kinds of "transactions."

1. Donor makes a contribution to Committee, directing that Committee use the contribution to make a contribution to State Candidate A.

In a transaction of this sort, where Committee uses the contribution to make a contribution to State Candidate A as specified by Donor, a contribution has *not* been made *to the committee.* If Committee merely delivers Donor's check to State Candidate A, Donor is the contributor and State Candidate A is the recipient of Donor's contribution. The contribution limit applicable here is the limit applicable to State Candidate A under Sections 85301 or 85302. If Committee first deposits the check into its bank account and delivers its own check to State Candidate A, Committee is an "intermediary" and State Candidate A is the recipient of the contribution from Donor. (Section 84302, Regulation 18432.5.) In both cases, the committee did *not* receive a contribution, and the limits of Section 85303 cannot apply to this kind of transaction.

2. Donor makes a contribution to Committee, directing that Committee use the contribution to make contributions to unspecified candidates for elective state office.

Transactions of this type differ from the example illustrated above in one critical detail. Donor in this case grants Committee discretion in the use of the contribution. Although Donor directed that the money be used to make contributions to one or more state candidates, as long as Committee has discretion to pick the recipient(s), Committee is not considered to be an intermediary of Donor. Committee is the true recipient of Donor's contribution in cases like this, and Section 85303 therefore limits the size of the contribution that Committee may accept.

3. Donor makes a contribution to Committee, directing that Committee use the contribution to conduct a fundraising event, the proceeds to be given as contributions to state candidates.

This transaction differs from the previous example, again, in one critical detail. Donor now directs Committee to take an additional step, to increase the funds before they are passed on as contributions. The question here, for purposes of Section 85303, is whether or not Donor can reasonably be said to have made a contribution for the purpose of making contributions to state candidates, or whether a more limited view is required – that Donor's purpose is merely to make a contribution to a fundraising event. Similarly, can Committee be said to have used the money to make contributions to state candidates, or only to raise funds for those candidates?

Staff believes that the language of the statute does not suggest that contribution limits apply only to contributions handed over immediately, dollar for dollar, in contributions to state candidates. Subdivision (c) exempts from limits only contributions that are "used for purposes other than making contributions to candidates for elective state office." A donor who makes a contribution to a fundraising event, the purpose of which is to distribute its proceeds as contributions, can certainly be said to make the contribution *for the purpose* of making contributions to the intended beneficiaries of the event, without offense to the norms of English usage. Indeed, no rational donor would contribute to a fundraiser whose stated goal was to use the proceeds to make contributions to state candidates, if he did not want his money to be used for that purpose. A committee that takes such a contribution, and uses it to make contributions to state candidates after the fundraising event, *uses* the contribution for that purpose, as anticipated by the donor.

B. Legislative History of Section 85303

Committee representatives object to subjecting fundraising contributions to the limits of Section 85303 primarily on grounds extrinsic to the statute. For example, in a letter to Luisa Menchaca dated April 19, 2006, Charles H. Bell, Jr. asserts that Section 85303(c), as enacted in 1988 by Proposition 73, was "the model for current Section 85303, subdivision (c)." This is a claim for limiting the present statute to the scope of the prior statute, repeated many times since that letter was written. Mr. Bell goes on to quote the earlier provision (emphasis added):

> "(c) Nothing in this chapter shall limit a person's ability to provide financial or other support to one or more political committees or broad based political committees provided the support is used for purposes other than making contributions *directly* to candidates for elective office."

Yet even if we accept the argument that the present statute is based on the language of the prior version, there is a critical difference between the 1988 statute and the Proposition 34 statute that demands explanation – the omission of the word "directly" in the current statute. In 1988, the word "directly" qualified the term "contribution," restricting application of contribution limits to "contributions [made] directly to candidates." Removal of "directly" from the current version of

Section 85303(c) necessarily *broadens* the language, extending limits to contributions made "~~directly~~ to candidates." So if the 1988 statute was limited to the second kind of "transaction" illustrated above, the present version would be expected to reach further, just as staff suggests.

The committees more vaguely cite "legislative history" to support their claim that the purpose of Section 85303 was to exempt committees from contribution limits. But it is well established that the core legislative history for an initiative is the analysis and argument presented in the Ballot Pamphlet, which explains the purpose of an initiative to the electorate – the "legislature" in the case of a ballot measure. Nowhere in the 2000 Ballot Pamphlet is such a purpose plainly stated.

The Ballot Pamphlet for Proposition 34 (Attachment) began as follows:

> Official Title and Summary Prepared by the Attorney General
>
> CAMPAIGN CONTRIBUTIONS AND SPENDING LIMITS. DISCLOSURE. Legislative Initiative Amendment.
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> • Limits individual campaign contributions per election: state legislature, $3,000; statewide elective office, $5,000 (small contributor committees may double these limits); governor, $20,000. Limits contributions to political parties/political committees for purpose of making contributions for support or defeat of candidates.
> • Establishes voluntary spending limits, requires ballot pamphlet to list candidates who agree to limit campaign spending.
> • Expands public disclosure requirements, increases penalties for violations.
> • Prohibits lobbyists' contributions to officials they lobby.
> • Limits campaign fund transfers between candidates, regulates use of surplus campaign funds.

The Ballot Pamphlet emphasized throughout that contribution limits would be imposed on candidates and committees. The arguments in favor of the measure emphasized these limits as a cure for unlimited special interest payments to candidates, while arguments against the measure said that the limits were too harsh. Neither side laid any emphasis on the benefits of lifting limits on contributions to committees. There is no evidence that the removal of these limits was under-stood by the voters as a central point of the measure. Whether or not this was an expectation of the drafters, it was not communicated to the voters who passed the measure.

C. Policy Considerations

Interested parties also argue that staff's interpretation is bad public policy. Staff does not agree. In the same year that Proposition 34 took effect, the United States Supreme Court issued a decision that succinctly illustrates fundamental policy considerations that favor interpretation of

Section 85303 in a manner that restricts contributions to PACs and political party committees, when those contributions are passed on as contributions to state candidates.

In *FEC v. Colorado Republican Federal Campaign Committee* 533 U.S. 431 (2001), the Supreme Court rejected the contention that limits on campaign expenditures by a political party, *even those that are coordinated with a candidate,* violate the Constitution. The high court based its decision, in large part, on its finding that:

> "In reality, parties continue to organize to elect candidates, and also function for the benefit of donors whose object is to place candidates under obligation, a fact that parties cannot escape." (*Id*. 533 U.S. at 455.)

This sentence rests on the court's preceding analysis of "how the power of money actually works in the political structure:"

> "The money parties spend comes from contributors with their own personal interests. PACs, for example, are frequent party contributors who (according to one of the Party's own experts) do not pursue the same objectives in electoral politics that parties do. PACs are most concerned with advancing their narrow interests and therefore provide support to candidates who share their views, regardless of party affiliation. … Parties are thus necessarily the instruments of some contributors whose object is not to support the party's message or to elect party candidates across the board, but rather to support a specific candidate for the sake of a position on one, narrow issue, or even to support any candidate who will be obliged to the contributors." (*Id.* at 533 U.S. 451, internal citations omitted.)

The "reality" to which the Supreme Court's refers is that persons (including PACs) behave as though they believe they can place candidates under obligation not only by contributions directly into candidates' campaign committees, but by circumventing the limits on direct contributions by making additional contributions to the candidates' political parties.

At footnote 26, the court responds to the argument that broad limits are not necessary when better enforcement of "earmarking" rules would serve the same purpose:

> "As we said in *Buckley*, the policy supporting contribution limits is the same as for laws against bribery… Under the Act, a donor is limited to $2,000 in contributions to one candidate in a given election cycle. The same donor may give as much as another $20,000 each year to a national party committee supporting the candidate. What a realist would expect to occur has occurred. Donors give to the party, with the tacit understanding that the favored candidate will benefit." (*Id*. at 458.)

Linking contributions and fundraising proceeds, the court quoted from the declaration of a

Senate candidate: "I understood that when I raised funds for the DSCC, the donors expected that I would receive the amount of their donations multiplied by a certain number…" (*Ibid*.)

The Supreme Court recognized that "substantial donations turn the parties into matchmakers whose special meetings and receptions give the donors the chance to get their points across to the candidates." (*Id.* at 461. See also the preceding footnote 25, referring to establishment by the party of "exclusive clubs for the most generous donors, who are invited to special meetings and social events with Senators and candidates.")

California faces all of the problems identified by the Supreme Court. The contribution limits that were the public centerpiece of Proposition 34 may soon be rendered meaningless in the public eye. These limits have been compromised by the many alternative channels through which contributions can be routed to candidates. Candidates now may accept large contributions to officeholder and legal defense accounts, ballot measure committees, and other entities set up by candidates or their supporters. The perception that elected officials are potentially as beholden to wealthy donors today as they were prior to the passage of Proposition 34 is well attested in the news media, with stories on these donations appearing almost weekly in newspapers statewide.

Direct contributions to candidate campaigns are limited by Sections 85301 and 85302. Section 85303 can easily be read to bar wealthy donors from giving unlimited contributions to party committees which, when used to fund state candidate fundraising events, are then effectively distributed as unlimited contributions to candidates who thus appear "under obligation" to the original donors.[1] *Any person who makes an outsized contribution to a PAC or party fundraising drive for state candidates will be recognized by the beneficiaries as the true source of the resulting contributions.*

The connection between a large contribution to a fundraiser, and the resulting proceeds, is direct and obvious. Section 85303 need not be interpreted in a fashion that invites unlimited contributions to fundraising drives whose avowed object is to pass contributions on to candidates for elective state office. This would open another door to donors who wish to place state candidates under obligation, gaining access and influence that Proposition 34 was supposed to have reduced.

[1] Contributions to and from PACs raise many of the same concerns as contributions to and from political parties. PAC contributions to candidates are subject to the same limits as contributions from individuals but, under a *narrow* reading of Section 85303(c), donors who are "maxed out" in direct donations to candidates could give unlimited sums to a PAC fundraiser, generating additional contributions to those same candidates.